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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 EZEQUIEL MELGOZA,
12 Plaintiff,

13 v.

14 NANCY A. BERRYHILL, Acting
15 Commissioner of Social Security,
16 Defendant.

Case No. CV 17-2659 JC

MEMORANDUM OPINION AND
ORDER OF REMAND

18 **I. SUMMARY**

19 On April 7, 2017, plaintiff Ezequiel Melgoza filed a Complaint seeking
20 review of the Commissioner of Social Security's denial of plaintiff's application
21 for benefits. The parties have consented to proceed before the undersigned United
22 States Magistrate Judge.

23 This matter is before the Court on the parties' cross motions for summary
24 judgment, respectively ("Plaintiff's Motion") and ("Defendant's Motion")
25 (collectively "Motions"). The Court has taken the Motions under submission
26 without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; April 18, 2017 Case
27 Management Order ¶ 5.
28

1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is REVERSED AND REMANDED for further proceedings
3 consistent with this Memorandum Opinion and Order of Remand.

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On November 28, 2012, plaintiff filed an application for Disability
7 Insurance Benefits alleging disability beginning on June 4, 2012, due to a repaired
8 shattered right shoulder, no more than 50% range of motion in his right shoulder,
9 stiffness of his left wrist, post left wrist surgery, anxiety, depression, migraines,
10 neck pain, lower back pain, and a puncture in his right lung. (Administrative
11 Record (“AR”) 28, 114, 137). The Administrative Law Judge (“ALJ”) examined
12 the medical record and heard testimony from plaintiff (who was represented by
13 counsel) and a vocational expert on December 4, 2015. (AR 1502-24).

14 On January 13, 2016, the ALJ determined that plaintiff was not disabled
15 through the date of the decision. (AR 28-37). Specifically, the ALJ found:
16 (1) plaintiff suffered from the following severe impairments: degenerative disc
17 disease of the cervical spine, bilateral shoulder impairments, a history of left
18 carpal tunnel release, back pain, a depressive disorder, post-traumatic stress
19 disorder, and anxiety (AR 30); (2) plaintiff’s impairments, considered singly or in
20 combination, did not meet or medically equal a listed impairment (AR 31);
21 (3) plaintiff retained the residual functional capacity to perform light work (20
22 C.F.R. § 404.1567(b) with additional limitations¹ (AR 33); (4) plaintiff could not
23 perform any past relevant work (AR 35); (5) there are jobs that exist in significant

25 ¹The ALJ determined that plaintiff was (i) unable to perform tasks at or above shoulder
26 level bilaterally; (ii) unable to perform repetitive gripping, grasping, or torquing with the left
27 wrist; (iii) unable to climb ladders, ropes, and scaffolds; (iv) able to occasionally climb, crouch,
28 balance, stoop, crawl, and kneel; (v) unable to work in environments with exposure to significant
hazards, including work at unprotected heights or near moving machinery; and (vi) limited to
only unskilled tasks. (AR 33).

1 numbers in the national economy that plaintiff could perform, specifically rental
2 clerk, usher, call-out operator, and addresser (AR 36); and (6) plaintiff's medically
3 determinable impairments could not reasonably have been expected to cause the
4 symptoms plaintiff alleged, and plaintiff's statements regarding the intensity,
5 persistence, and limiting effects of such subjective symptoms were not entirely
6 credible (AR 34).

7 On February 7, 2017, the Appeals Council denied plaintiff's application for
8 review. (AR 6).

9 **III. APPLICABLE LEGAL STANDARDS**

10 **A. Administrative Evaluation of Disability Claims**

11 To qualify for disability benefits, a claimant must show that he is unable "to
12 engage in any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which
14 has lasted or can be expected to last for a continuous period of not less than 12
15 months." Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012) (quoting 42
16 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). To be considered
17 disabled, a claimant must have an impairment of such severity that he is incapable
18 of performing work the claimant previously performed ("past relevant work") as
19 well as any other "work which exists in the national economy." Tackett v. Apfel,
20 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)).

21 To assess whether a claimant is disabled, an ALJ is required to use the five-
22 step sequential evaluation process set forth in Social Security regulations. See
23 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
24 Cir. 2006) (citations omitted) (describing five-step sequential evaluation process)
25 (citing 20 C.F.R. §§ 404.1520, 416.920). The claimant has the burden of proof at
26 steps one through four – *i.e.*, determination of whether the claimant was engaging
27 in substantial gainful activity (step 1), has a sufficiently severe impairment (step
28 2), has an impairment or combination of impairments that meets or equals a listing

1 in 20 C.F.R. Part 404, Subpart P, Appendix 1 (step 3), and retains the residual
2 functional capacity to perform past relevant work (step 4). Burch v. Barnhart, 400
3 F.3d 676, 679 (9th Cir. 2005) (citation omitted). The Commissioner has the
4 burden of proof at step five – *i.e.*, establishing that the claimant could perform
5 other work in the national economy. Id.

6 **B. Federal Court Review of Social Security Disability Decisions**

7 A federal court may set aside a denial of benefits only when the
8 Commissioner’s “final decision” was “based on legal error or not supported by
9 substantial evidence in the record.” 42 U.S.C. § 405(g); Trevizo v. Berryhill, 871
10 F.3d 664, 674 (9th Cir. 2017) (citation and quotation marks omitted). The
11 standard of review in disability cases is “highly deferential.” Rounds v.
12 Commissioner of Social Security Administration, 807 F.3d 996, 1002 (9th Cir.
13 2015) (citation and quotation marks omitted). Thus, an ALJ’s decision must be
14 upheld if the evidence could reasonably support either affirming or reversing the
15 decision. Trevizo, 871 F.3d at 674-75 (citations omitted). Even when an ALJ’s
16 decision contains error, it must be affirmed if the error was harmless. Treichler v.
17 Commissioner of Social Security Administration, 775 F.3d 1090, 1099 (9th Cir.
18 2014) (ALJ error harmless if (1) inconsequential to the ultimate nondisability
19 determination; or (2) ALJ’s path may reasonably be discerned despite the error)
20 (citation and quotation marks omitted).

21 Substantial evidence is “such relevant evidence as a reasonable mind might
22 accept as adequate to support a conclusion.” Trevizo, 871 F.3d at 674 (citation
23 and quotation marks omitted). It is “more than a mere scintilla, but less than a
24 preponderance.” Id. When determining whether substantial evidence supports an
25 ALJ’s finding, a court “must consider the entire record as a whole, weighing both
26 the evidence that supports and the evidence that detracts from the Commissioner’s
27 conclusion[.]” Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014) (citation
28 and quotation marks omitted).

1 While an ALJ’s decision need not be drafted with “ideal clarity,” at a
2 minimum it must describe the ALJ’s reasoning with sufficient specificity and
3 clarity to “allow[] for meaningful review.” Brown-Hunter v. Colvin, 806 F.3d
4 487, 492 (9th Cir. 2015) (citations and internal quotation marks omitted); see
5 generally 42 U.S.C. § 405(b)(1) (“ALJ’s unfavorable decision must, among other
6 things, “set[] forth a discussion of the evidence” and state “the reason or reasons
7 upon which it is based”); Securities and Exchange Commission v. Chenery Corp.,
8 332 U.S. 194, 196-97 (1947) (administrative agency’s determination must be set
9 forth with clarity and specificity). Federal courts review only the reasoning the
10 ALJ provided, and may not affirm the ALJ’s decision “on a ground upon which
11 [the ALJ] did not rely.” Trevizo, 871 F.3d at 675 (citations omitted).

12 A reviewing court may not conclude that an error was harmless based on
13 independent findings gleaned from the administrative record. Brown-Hunter, 806
14 F.3d at 492 (citations omitted). When a reviewing court cannot confidently
15 conclude that an error was harmless, a remand for additional investigation or
16 explanation is generally appropriate. See Marsh v. Colvin, 792 F.3d 1170, 1173
17 (9th Cir. 2015) (citations omitted).

18 **C. Pertinent Step Five Legal Standards**

19 At step five, the Commissioner must show that there is sufficient other work
20 in the national economy a claimant can still do, taking into account the claimant’s
21 background (*i.e.*, age, education, and work experience) and residual functional
22 capacity (*i.e.*, tasks the claimant is still able to do despite any impairment-related
23 physical and mental limitations). 42 U.S.C. § 423(d)(2)(A); 20 C.F.R.
24 §§ 404.1520(a)(4)(v) & (g), 404.1560(c); see Gutierrez v. Colvin, 844 F.3d 804,
25 806 (9th Cir. 2016) (citing Tackett, 180 F.3d at 1100). One way the
26 Commissioner may satisfy this burden is by obtaining testimony from an impartial
27 vocational expert (“vocational expert” or “VE”) about the type of work such a
28 claimant is still able to perform, as well as the availability of related jobs in the

1 national economy. See Gutierrez, 844 F.3d at 806-07 (citation omitted);
2 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001) (citing Tackett, 180 F.3d
3 at 1100-01).

4 When a vocational expert is consulted at step five, the ALJ typically asks
5 the VE at the hearing to identify specific examples of occupations that could be
6 performed by a hypothetical individual with the same characteristics as the
7 claimant. Zavalin v. Colvin, 778 F.3d 842, 846 (9th Cir. 2015) (citations omitted);
8 Hill v. Astrue, 698 F.3d 1153, 1161 (9th Cir. 2012) (citations omitted). The VE’s
9 responsive testimony may constitute substantial evidence of a claimant’s ability to
10 perform such occupations so long as the ALJ’s hypothetical question included all
11 of the claimant’s limitations supported by the record. See Hill, 698 F.3d at 1161-
12 62 (citations omitted); Robbins v. Social Security Administration, 466 F.3d 880,
13 886 (9th Cir. 2006) (citation omitted).

14 A VE’s testimony generally should be consistent with the Dictionary of
15 Occupational Titles (“DOT”).² See Lamear v. Berryhill, 865 F.3d 1201, 1205 (9th
16 Cir. 2017) (“Presumably, the opinion of the VE would comport with the DOT’s
17 guidance.”); see generally Gutierrez, 844 F.3d at 807 (DOT “guides the [ALJ’s]
18 analysis” at step five). To the extent it is not – *i.e.*, the VE’s opinion “conflicts
19 with, or seems to conflict with” the DOT – an ALJ may not rely on the VE’s
20 testimony at step five unless the ALJ has adequately resolved the potential
21 conflict. Gutierrez, 844 F.3d at 807 (citing SSR 00-4P, 2000 WL 1898704, at *2
22 (2000)); Rounds, 807 F.3d at 1003-04 (citations omitted); SSR 00-4p, 2000 WL

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24 ²The DOT compiled by the U.S. Department of Labor “details the specific requirements
25 for different occupations,” and is the Social Security Administration’s “‘primary source of
26 reliable job information’ regarding jobs that exist in the national economy.” Gutierrez, 844 F.3d
27 at 807; Zavalin, 778 F.3d at 845-46 (citing Terry v. Sullivan, 903 F.2d 1273, 1276 (9th Cir.
28 1990)); see also 20 C.F.R. §§ 404.1566(d)(1), 404.1569. Neither the DOT nor a VE’s opinion,
however, “automatically ‘trumps’” to the extent the two conflict. Massachi v. Astrue, 486 F.3d
1149, 1153 (9th Cir. 2007) (quoting Social Security Ruling (“SSR”) 00-4p) (internal quotation
marks omitted).

1 1898704, at *4 (“When vocational evidence provided by a VE [] is not consistent
2 with information in the DOT, the [ALJ] must resolve [the] conflict before relying
3 on the VE [] evidence to support a determination or decision that the individual is
4 or is not disabled.”). In each case where VE testimony is used, an ALJ generally
5 must affirmatively (1) ask the VE whether there is a conflict between the expert’s
6 opinions and the DOT requirements for a particular occupation; (2) “obtain a
7 reasonable explanation for any apparent conflict”; and (3) explain in the decision
8 how the ALJ resolved any such conflict. Massachi, 486 F.3d at 1152-53 (quoting
9 SSR 00-4p).

10 An ALJ need only resolve conflicts that are “obvious or apparent” – such as
11 when the VE testifies that a claimant is able to perform an occupation which
12 involves “essential,” “integral” or “expected” job requirements that appear to be
13 more than a claimant’s residual functional capacity would permit. See Gutierrez,
14 844 F.3d at 808 (conflict is “obvious or apparent” when VE testimony is “at odds
15 with” job requirements listed in DOT that are “essential, integral, or expected”).
16 The extent to which an ALJ must scrutinize a VE’s opinions is highly
17 “fact-dependent.” Lamear, 865 F.3d at 1205 (citation omitted). For example,
18 “less scrutiny” is required where the VE has identified a representative occupation
19 that is “familiar” (e.g., “cashiering”). Gutierrez, 844 F.3d at 808. In such cases an
20 ALJ may be able to resolve a potential conflict without inquiring further of the VE
21 – *i.e.*, based on “common experience” that it is “likely and foreseeable” that a
22 claimant with certain limitations would still be able to perform all of the
23 “essential, integral, [and] expected” requirements the DOT described for the
24 particular occupation. See, e.g., Gutierrez, 844 F.3d at 807-08 (e.g., no “apparent
25 or obvious conflict” between DOT listing for “cashier” occupation which requires
26 “frequent reaching” and VE’s testimony that claimant could still work as a cashier
27 despite her inability to reach above shoulder level with her right arm given how
28 “uncommon it is for most cashiers to have to reach overhead” at all).

1 Conversely, where a representative occupation is “more obscure,” ordinarily
2 an ALJ would not be able to resolve an apparent conflict at step five based solely
3 on “common experience,” but instead would need to ask the VE to provide a more
4 detailed explanation of the apparently conflicting opinion. Lamear, 865 F.3d at
5 1205 (footnote omitted); see also id. (“The ALJ is not absolved of this duty [to
6 reconcile conflicts] merely because the VE responds ‘yes’ when asked if her
7 testimony is consistent with the DOT.”) (quoting Moore v. Colvin, 769 F.3d 987,
8 990 (8th Cir. 2014)); see, e.g., Buckner-Larkin v. Astrue, 450 Fed. Appx. 626,
9 628-29 (9th Cir. 2011) (conflict between DOT and VE testimony adequately
10 addressed where VE reasonably explained that deviation “was based on his own
11 labor market surveys, experience, and research” and ALJ’s decision addressed
12 explanation).

13 **IV. DISCUSSION**

14 Here, plaintiff asserts that the ALJ erred at step five in finding that plaintiff
15 could perform the representative occupations of rental clerk (DOT § 295.357-018,
16 1991 WL 672589 [Furniture-Rental Consultant]), usher (DOT § 344.677-014,
17 1991 WL 672865), call-out operator (DOT § 209.587-010, 1991 WL 672186), and
18 addresser (DOT § 237.367-014, 1991 WL 671797) (collectively “representative
19 occupations”) based on testimony from the vocational expert which, without
20 explanation, deviated from the DOT. (Plaintiff’s Motion at 5-8). As the Court
21 cannot find that the ALJ’s decision in this regard is supported by substantial
22 evidence or that any error was harmless, a remand is warranted.

23 First, here, there is an apparent conflict between the vocational expert’s
24 testimony and the DOT. In response to a hypothetical question posed by the ALJ
25 at the hearing, the VE opined that an individual with the same characteristics as
26 plaintiff would be able to perform each of the representative occupations. (AR
27 1517-21). According to the DOT, however, the representative occupations
28 involve reaching either occasionally (DOT §§ 295.357-018 [Furniture-Rental

1 Consultant]), 344.677-014 [Usher], 209.587-010 [Call-Out Operator]), or
2 frequently (DOT § 237.367-014 [Addresser]). As plaintiff points out, “reaching”
3 for purposes of the DOT generally “connotes the ability to extend one’s hands and
4 arms ‘in any direction[.]’” Gutierrez, 844 F.3d at 808 (citing SSR 85-15, 1985
5 WL 56857). While the DOT listings do not indicate that the representative
6 occupations require reaching in any specific direction, they also do not suggest
7 that acceptable and efficient performance of such occupations would *never* require
8 reaching at or above shoulder level. Consequently, the reaching requirements for
9 the representative occupations appear to be inconsistent with plaintiff’s inability to
10 do any work “at or above shoulder level.” Cf., e.g., Gutierrez, 844 F.3d at 808
11 (“[N]ot every job that involves reaching requires the ability to reach overhead.”).
12 The VE generally indicated that her testimony was consistent with the DOT (AR
13 1522), but provided no explanation for her opinion which essentially suggests that
14 an individual like plaintiff would be able to perform occupations which, according
15 to the DOT, seem to require certain activities that are beyond plaintiff’s abilities.

16 The Court cannot infer from common experience that it is likely or
17 foreseeable that a rental clerk, usher, call-out operator, or addresser who, like
18 plaintiff, is unable to do any work at or above shoulder level would still be able
19 adequately to perform all essential, integral, and/or expected tasks for even one of
20 the representative occupations. Indeed, the DOT suggests quite the opposite. For
21 example, according to the DOT, the rental clerk occupation involves work at the
22 light exertional level, which could require “pushing and/or pulling of arm []
23 controls,” and/or “the constant pushing and/or pulling of materials,” as well as
24 occasional “[s]tooping” and “[c]rouching.” (DOT § 295.657-018, 1991 WL
25 672589). A rental clerk, among other general tasks, typically “[r]ents furniture
26 and accessories to customers,” “[t]alks to customer[s] to determine furniture
27 preferences and requirements,” “[g]uides or accompanies customer[s] through
28 showroom, answers questions, and advises customer on compatibility of various

1 styles and colors of furniture items.” (DOT § 295.657-018, 1991 WL 672589).
2 Common experience strongly suggests that a rental clerk could very likely need to
3 reach at or above shoulder level in order adequately to perform the “essential,
4 integral, or expected tasks” of the position (*e.g.*, it is reasonably foreseeable that a
5 rental clerk might need to reach above shoulder level while showing furniture to a
6 customer, especially if the clerk was crouching or stooping to display the lower
7 portion of a particular item).

8 The usher occupation, according to the DOT, also involves work at the light
9 exertional level and occasional stooping and crouching, and requires a worker,
10 among other tasks, to “[a]ssist[] patrons at entertainment events to find seats . . .
11 and locate facilities, such as restrooms and telephones . . . [d]istribute[] programs
12 to patrons,” and “[a]ssist[] other workers to change advertising display[s].” (DOT
13 § 344.677-014, 1991 WL 672865). It is neither “unlikely” nor “unforeseeable”
14 that an usher performing his job duties would at various points be required to
15 reach at or above shoulder level (*e.g.*, while pointing patrons in the direction of
16 seats or facilities located on a higher level of an amphitheater or helping a
17 colleague replace an advertising poster on the wall).

18 Similarly, the DOT lists the addresser and call-out operator occupations as
19 involving work at the sedentary exertional level, thus, in part, requiring “sitting
20 most of the time.” (DOT §§ 209.587-010, 1991 WL 672186 [call-out operator],
21 237.367-014, 1991 WL 671797 [addresser]). It is reasonably foreseeable that an
22 addresser or call-out operator would need to reach at or above shoulder level from
23 a sitting position at regular points during the day while performing one of the
24 essential, integral, or expected tasks of either position (*e.g.*, an addresser while
25 “sort[ing] mail”, or a call-out operator while “using [a] telephone” or entering data
26 into a computer). (DOT §§ 209.587-010, 1991 WL 672186, 237.367-014, 1991
27 WL 671797).

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1 Second, since neither the VE nor the ALJ here acknowledged the apparent
2 conflict between the VE's testimony and the DOT's requirements for the
3 representative occupations, neither made any attempt to explain or justify such
4 conflict. (AR 36-37, 1516-22). Accordingly, the VE's testimony, which the ALJ
5 adopted, could not serve as substantial evidence supporting the ALJ's
6 determination at step five that plaintiff could perform any of the representative
7 occupations. See Rounds, 807 F.3d at 1003 (citations omitted).

8 Third, this Court cannot confidently conclude that the ALJ's error was
9 harmless. As discussed above, it cannot fairly be determined from the instant
10 record, the DOT, or even common experience whether the reaching required by
11 any of the representative occupations could be performed in an acceptable and
12 efficient manner by a worker who, like plaintiff, is unable to do any work at or
13 above shoulder level bilaterally. See, e.g., Lamear, 865 F.3d at 1206 (court cannot
14 say ALJ's failure to inquire more specifically of vocational expert was harmless
15 error where unable to determine from the record, the DOT, or common experience
16 whether the VE identified representative occupations with DOT requirements that
17 exceed a claimant's abilities); Zavalin, 778 F.3d at 848 (ALJ's failure adequately
18 to reconcile apparent conflict between VE and DOT not harmless error where
19 court was unable to determine from "mixed record" whether substantial evidence
20 supported ALJ's step-five finding that claimant could perform other work the VE
21 identified) (citing Massachi, 486 F.3d at 1154). In addition, defendant points to
22 no persuasive evidence in the record which supports the VE's apparent deviation
23 from the DOT or which could otherwise support the ALJ's non-disability
24 determination at step five. See generally Zavalin, 778 F.3d at 846 ("ALJ's failure
25 to resolve an apparent inconsistency may leave . . . a gap in the record that
26 precludes [court] from determining whether the ALJ's decision is supported by
27 substantial evidence") (citing Massachi, 486 F.3d at 1154).

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1 Finally, the Court rejects defendant's contention that “[p]laintiff waived his
2 right to challenge the VE's upper extremity testimony when he failed to raise the
3 issue or challenge that testimony both at hearing and before the Appeals Council.”
4 (Defendant's Motion at 6) (citing Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir.
5 1999); Shaibi v. Berryhill, 870 F.3d 874, 881 (9th Cir. 2017), opinion amended
6 and superseded on denial of reh'g, Shaibi v. Berryhill (“Shaibi II”), __ F.3d __,
7 2017 WL 7798666 (9th Cir. Aug. 22, 2017)). Such a waiver does not occur
8 where, like here, the ALJ failed adequately to resolve an apparent conflict between
9 the VE's testimony and *the DOT*. See Shaibi II, __ F.3d at __, 2017 WL 7798666,
10 at *6 (“[A]n ALJ is required to investigate and resolve any apparent conflict
11 between the VE's testimony and the DOT, regardless of whether a claimant raises
12 the conflict before the agency.”) (citing SSR 00-4P; Lamear, 865 F.3d at 1206-07;
13 Massachi, 486 F.3d at 1152-54).

14 **V. CONCLUSION**

15 For the foregoing reasons, the decision of the Commissioner of Social
16 Security is reversed in part, and this matter is remanded for further administrative
17 action consistent with this Opinion.³

18 LET JUDGMENT BE ENTERED ACCORDINGLY.

19 DATED: March 8, 2018

20 /s/
21 _____
22 Honorable Jacqueline Chooljian
23 UNITED STATES MAGISTRATE JUDGE
24 _____

25 ³When a court reverses an administrative determination, “the proper course, except in rare
26 circumstances, is to remand to the agency for additional investigation or explanation.”
27 Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and
28 quotations omitted). Remand is proper where, as here, “additional proceedings can remedy
defects in the original administrative proceeding. . . .” Garrison, 759 F.3d at 1019 (citation and
internal quotation marks omitted).